

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of SIMMONS/DAVIS, Minors.

UNPUBLISHED
May 20, 2014

No. 318735
Clinton Circuit Court
Family Division
LC No. 11-023127-NA

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

Respondent, J. Simmons, appeals as of right the trial court's order terminating his parental rights to his two minor children. Simmons asserts that the trial court erred when it found that the Department of Human Services (the Department) made reasonable efforts to reunify him with his children because the Department did not provide him with appropriate services given his intellectual limitations. We affirm.

I. FACTS

A. THE CHILDREN'S FIRST REMOVAL

When the Department removed the children in August 2011, Simmons and the children lived with J. Davis, the children's mother, and Davis's three additional children. The Department alleged that Davis did not provide the children with proper care and custody, the home was in poor condition, and a worker found one of the children strapped into a car seat full of urine. Simmons admitted that the home was sparsely furnished, dirty, lacked food, and that he had strapped his son into a car seat before leaving for work.

B. SERVICES AFTER THE FIRST REMOVAL

In October 2011, Rachel Bridget, a Department worker, testified that Simmons and Davis were participating in parenting classes, drug screens, and parenting time. The trial court ordered Simmons to participate in a psychological evaluation. From November 2011 to April 2012, Simmons actively participated in services. He attended parenting classes and obtained employment. He implemented parenting strategies from parenting classes. The Department indicated that Simmons's psychological evaluation was delayed because the evaluator was unavailable.

In April 2012, Brian Brown, the children's case worker, testified that Dr. Lynn Simmons had conducted Simmons's psychological evaluation. Dr. Lynn Simmons reported that Simmons was emotionally immature and suffered from cognitive disabilities. Dr. Lynn Simmons concluded that Simmons would be unable to identify or prevent future neglect. Brown urged the trial court to give Simmons longer to prove himself because he had shown energy and initiative while engaging in services. The trial court expressed its concern that Simmons relied on Davis, who was not showing progress, for parenting assistance. However, it ordered the Department to continue reunification services.

From April 2012 to December 2012, Simmons continued to make steady progress on his case service plan. In January 2013, the Department reunified Simmons and his children. Brown testified that Simmons had a safety plan in place, had a parent-aid service, and was seeking assistance through Families First. Brown testified that the parent aid, Trixie Brown, assisted Simmons and Davis with medical care, school, discipline, and daily household needs. Brown testified that Elizabeth Hatt also helped provide significant work in the home.

C. THE CHILDREN'S SECOND REMOVAL

At an emergency hearing in March 2013, Brown reported that Simmons and Davis had made progress at first. However, Brown testified that he had recently seen the children begging for food and water, and that Simmons appeared to have regressed. Brown testified that the home had since become "trashed," with kitty litter on the floor, food all over the house, rotten food on the floor in the children's bedroom—which he saw them pick up and eat—and a strong urine smell. The trial court ordered the Department to remove the children.

In April 2013, Brown testified that Simmons's counselor, Anthony Solitro, indicated that Simmons would benefit from psychiatric services, but Simmons refused to participate in those services. Brown recommended that the trial court change the children's permanency goal to adoption. The trial court ordered the Department to petition to terminate Simmons's parental rights. Simmons moved out of Davis's home and contested termination.

D. THE TERMINATION HEARING

At the termination hearing, Brown testified that he had strongly recommended services for Simmons, despite the poor prognosis in Simmons's psychological evaluation. Brown testified that Simmons's services included parenting classes, substance abuse services, a psychological evaluation, mental health counseling, individual counseling, couples counseling, a parent aid, and transportation assistance. Brown testified that Hatt and Trixie Brown had helped extensively in the home.

Solitro testified that he provided mental health counseling to Simmons, and assisted him with maturity, relationship, depression, and financial issues. Solitro testified that Simmons benefitted from his services and recommended reunification.

Anna Walton testified that she provided counseling services to Davis and Simmons, saw Simmons at least 20 times, and shared her impressions and recommendations with Solitro. Walton testified that she helped Simmons with parenting techniques, budgeting, money management, and his relationship with Davis.

Walton testified that Simmons was unable to parent independently. Walton testified that Simmons had significant cognitive and emotional impairments, and functioned at the level of a six-year-old. Walton testified that Simmons was not able to recognize safety concerns. Walton also testified that Simmons would be unable to keep a clean home, even though she had shown him how to do so, modeled behavior for him, and put services into his home to provide modeling. Hatt testified that, while in Simmons's home, she had tried to show him how to shop and prepare food, but he did not take initiative and would become easily frustrated. Walton concluded that Simmons had not benefitted from the services.

II. REASONABLE EFFORTS TO REUNIFY

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

Generally, we review for clear error the trial court's finding that the Department engaged in reasonable efforts to reunify a child with his or her parent.¹ A finding is clearly erroneous if, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made."²

However, a parent fails to preserve a challenge to a service plan when the parent waits until late in the proceedings to challenge his or her services.³ The time for a parent to challenge a service plan is when the trial court initially adopts it.⁴ Here, Simmons did not challenge the Department's service plan before the trial court, and asserts this issue for the first time on appeal. Therefore, this issue is not preserved.

The sufficiency of the Department's efforts to reunify a child with his or her parents implicates the parent's fundamental liberty interest in the care and custody of his or her children.⁵ This Court will consider unpreserved claims of constitutional error in parental rights proceedings to determine whether the error was a plain error affecting the parent's substantial

¹ *In re Mason*, 486 Mich 142, 152, 166; 782 NW2d 747 (2010).

² *Id.* at 152 (quotation marks and citations omitted).

³ *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000); *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012).

⁴ *Terry*, 240 Mich App at 27; *Frey*, 297 Mich App at 247.

⁵ *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982); *In re Rood*, 483 Mich 73, 99; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.).

rights.⁶ An error is plain if it is clear or obvious.⁷ It affects a parent's substantial rights if it affected the outcome of the lower court proceedings.⁸

B. LEGAL STANDARDS

The trial court must make reasonable efforts to reunify a child with his or her family unless aggravating circumstances are present.⁹ The purpose of a case service plan is to facilitate returning children to their parents.¹⁰ Accordingly, a parent's service plan must address the problems that brought the children into care.¹¹ The trial court must give the parent an opportunity to demonstrate he or she can protect and care for his or her children.¹²

Even a parent with disabilities must demonstrate that he or she can meet his or her children's basic needs.¹³ But our statutes do not require a parent to personally care for a child.¹⁴ For instance, a parent may entrust the care of his or her children to others.¹⁵

C. APPLYING THE STANDARDS

Simmons contends that the trial court clearly erred when it found that the Department made reasonable efforts to reunify him with his children. Simmons contends that the Department (1) did not provide him with services until 9 months into the case, (2) failed to target services to his individual needs, and (3) failed to treat him separately from Davis. We disagree.

However, the Department actually began providing Simmons with parenting classes immediately. The trial court also ordered the Department to provide Simmons with a psychological evaluation. Though the psychological evaluation was delayed for 9 months, there is no indication that the delay was the Department's fault. After the psychological evaluation, the Department provided Simmons with intensive services, including assistance and behavior modeling in the home. The Department's services assisted Simmons to such an extent that the trial court eventually returned the children to his care. Short of providing Simmons with a live-

⁶ *In re Williams*, 286 Mich App 253, 273-274; 779 NW2d 286 (2009), citing *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

⁷ See *Carines*, 460 Mich at 764.

⁸ See *Id.*

⁹ MCL 712A.19a(2).

¹⁰ MCL 712A.18f(3); *Mason*, 486 Mich at 156.

¹¹ MCL 400.115b(2); *Rood*, 483 Mich at 97.

¹² See *Rood*, 483 Mich at 98.

¹³ *Terry*, 240 Mich App at 28.

¹⁴ *Mason*, 486 Mich at 161.

¹⁵ See *Mason*, 486 Mich at 161 n 11.

in assistant, which the Department need not do,¹⁶ it is not clear what additional services would have been reasonable.

There is also evidence that the Department targeted services to Simmons's individual needs. Solitro testified that he was Simmons's individual counselor, and Hatt testified that she attempted to model behaviors for Simmons. Further, early in the case, the trial court expressed concerns that Simmons was continuing to rely on Davis for parenting support. Simmons chose to continue to rely on Davis, rather than seeking someone else to help provide him with parental support or seeking someone to whom he could entrust the care of his children.

III. CONCLUSION

In sum, the trial court gave Simmons the opportunity to demonstrate that he could provide safety for his children, and the Department provided him with resources to do so. Though it is clear that Simmons loved his children and only wanted the best for them, it is also clear that he was unable to implement strategies to keep his children healthy and safe. We conclude that the trial court did not plainly err when it found that the Department engaged in reasonable efforts to reunify Simmons with his children.

We affirm.

/s/ E. Thomas Fitzgerald

/s/ Henry William Saad

/s/ William C. Whitbeck

¹⁶ *Terry*, 240 Mich App at 27-28.